IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1424

DARREL E. SHELTON, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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March 14, 1979

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The petitioner Darrel E. Shelton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 27, 1978.

OPINION BELOW

The opinion of the Court of Appeals, reported at 588 F.2d 1242, appears in Appendix A hereto. A petition for rehearing was denied by order appearing in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 27, 1978, affirming petitioner's conviction dated February 11, 1977. The Court of Appeals denied a timely petition for rehearing on January 17, 1979. Thereafter, on February 5, 1979, Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including March 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 22(2), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I

Whether the government's clear violation of the rule of Brady v. Maryland

which could have affected the outcome of the trial is excused by the defendant's failure to demonstrate diligence in his independent pursuit of such exculpatory information?

II

Whether in a prosecution for willfully making a materially false income tax return in violation of 26 U.S.C. §7206(1) wherein the alleged falsity consisted of the receipt of items of value claimed by defendant to be gifts, the instructions on willfulness misled the jury?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§7206. Fraud and False Statements. Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties

of perjury and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than three years, or both, together with the costs of prosecution.

STATEMENT

Petitioner Darrel E. Shelton was charged in a one count indictment with willfully and knowingly making and subscribing a materially false 1972 individual income tax return in violation of 26 U.S.C. §7206(1). The indictment alleged that petitioner under-reported his income for 1972 by an unspecified yet "substantial" amount.

Trial began on November 23, 1976 and occupied nine days including three days of jury deliberation. The jury returned a guilty verdict on December 9, 1976.

Petitioner was sentenced to a term of eighteen months imprisonment and a $5,000

fine, the term of imprisonment being suspended and petitioner placed on probation for a period of three years on the condition that he serve the first six months in custody. Petitioner remains at liberty on bond pending determination of this petition.

In 1972 petitioner was the Business Manager for Ironworkers Union, Shopmen's Local 509. In essence, the government claimed that petitioner received and failed to report as income the following cash, personal property and accommodations in 1972:

	ITEM	AMOUNT
1.	Refrigerator	$ 872.55
2.	Hotel bill	134.26
3.	Clothing	422.00
4.	Cash	5,000.00
5.	Television set	314.95
6.	Hotel bill	476.43
	Total	$7,220.19

The government claimed that petitioner received these items as payment from one Joseph Hauser, in anticipation of petitioner

causing his union to shift its prepaid health insurance plan to National Prepaid Health Plan (NPHP), run by Hauser.

At trial, petitioner testified and admitted having received four of the six items but that he regarded them as gifts from his long-time friend Hauser, hence not reportable as income. Petitioner specifically denied receiving the $5,000 cash payment and the clothing.

Ronald Prohaska was the government's key witness. Prohaska had formerly been employed by Local 509 as a business agent working under petitioner. Petitioner caused Prohaska to be fired from his position. Prohaska testified that the union's health insurance plan was up for renegotiation in 1972 and that petitioner told him in 1971 that Hauser would pay them both if they could swing the union's health insurance to NPHP, Hauser's company. The union did shift to NPHP in mid-1972. Prohaska further testified that he, petitioner and Hauser were present at a clothing store when Hauser bought several hundred dollars worth of clothing for the

two of them. Prohaska's testimony also included the allegation that he and petitioner each received a $5,000 cash payment from Hauser.

Prohaska further testified that after a government investigation of Hauser was begun, he, petitioner, Hauser and Hauser's accountant, Sidney Krems, met together and discussed how to cover up Hauser's payments to Prohaska and petitioner which might "haunt" them.

The defense mounted an attack on Prohaska's credibility. Not only was Prohaska's testimony directly contradicted by petitioner, Hauser and another witness, but Prohaska admitted that he had committed perjury several times before the grand jury concerning the investigation of Hauser's activities. Further, Prohaska reluctantly admitted having been paid more than $3,000 by the government in informant's fees disguised as witness payments. Finally, Prohaska admitted that he had been a subject of potential charges himself and had been given immunity in return for his cooperation as as witness.

During the trial and after Prohaska testified as to the alleged "cover up" meeting in which Sidney Krems was claimed to have been a participant, petitioner requested any government memoranda of interview of Krems. The government acknowledged that there had been such an interview with Krems by special agents of the I.R.S. in which Krems "confirms the meeting but alleges that there was no discussion of any cover up". (Tr. 396.) The district court ordered the interview report produced to the defense by 5:00 p.m. that night. The government responded that it had only grand jury testimony of Sidney Krems and "that is all we have". (Tr. 397.) The next day the government confirmed to the court that it had learned that an I.R.S. inverview of Sidney Krems had taken place on March 7, 1974 but that it did not have the report of interview to produce. The court told the prosecutor to give defense counsel Sidney Krems' last known address and to continue to try to find the March 7, 1974 interview report. The court further ordered I.R.S.

personnel in the courtroom to search I.R.S. files for the interview memorandum and to make it available to the defense. The court asked for a progress report on the search for the missing memorandum the next day. (Tr. 508-510.)

The next day the government advised the court that the interview report had not been located but that the search would continue. (Tr. 915.)

Six months after the trial was over, during the briefing of the appeal, the government produced the Krems interview report for the first time. Having been found in the office of the government attorney, it was the subject of a government motion to augment the record on appeal below which was granted by the Court of Appeals. Accompanying this motion was the prosecutor's affidavit stating that during the search for the memorandum during petitioner's trial another government attorney "had simply failed to think" to look in the file drawer where the memorandum was ultimately found by accident. In the finally disclosed memorandum, Sidney

Krems, Hauser's accountant, states: "I know of no payoffs that Joe made to anyone" and "I am not aware of any payoffs or cover-up." The government's theory at petitioner's trial, of course, was that Joe Hauser had "paid-off" petitioner.

REASONS FOR GRANTING THE WRIT

I

Does Brady Require Defense Diligence?

Petitioner's conviction rested almost solely on the uncorroborated testimony of the government's star witness, Ronald Prohaska, an immunized admitted perjurer who was paid more than $3,000 by the government for his "cooperation". Petitioner's defense, accordingly, focused on Prohaska and his lack of credibility. On direct examination by the government, Prohaska testified that Sidney Krems, an accountant, attended a meeting with Prohaska, Hauser and petitioner in 1973 in order to discuss a cover-up of Hauser's payoffs to petitioner and Prohaska. As

the Court of Appeals below noted, the government "relied heavily" on this testimony to demonstrate petitioner's willfulness in failing to report payments by Hauser that petitioner realized constituted income to him. (App. A at 11.)

The defense made a request thereafter under Brady v. Maryland, 373 U.S. 83 (1963) for production of reports of interview of Krems and the District Court so odered. (App. A at 10.) Because the Krems memorandum was not turned over to the defense until petitioner's case was being briefed on appeal, however, the District Court had no opportunity to consider the effect of the failure to disclose in light of the document itself. This analysis was performed for the first time by the Court of Appeals in its opinion below.

The Court of Appeals found that petitioner made a specific request for the Krems memorandum which gave the government notice of exactly what was desired. Further, the Court of Appeals found that the Krems statement was "material in a Brady

sense". (App. A at 11.) Because Krems was not a central figure in the alleged crime (like petitioner and Hauser, both of whom denied the meeting occurred) Krems' testimony in that regard, had it been given, "may have been given greater credibility by the jury". (App. A at 11.) Based upon this rationale, the Court of Appeals concluded that suppression of the Krems statement might have affected the outcome of the trial. However, a majority of the panel of the Court of Appeals declined to order a new trial for petitioner because defense counsel had not demonstrated due diligence in attempting to obtain Krems' evidence independently.

Petitioner contends that the record does not support a finding of lack of diligence but that, in any event, defense diligence or the lack thereof in attempting to independently develop exculpatory evidence does not play a role in assessing the effect of the government's failure to disclose such evidence admittedly in their possession.

The unprecedented holding of the Court of Appeals, from which one member of the panel dissented, is without substantial authority and appears to conflict with this Court's ruling in United States v. Agurs, 427 U.S. 97 (1976). In Agurs, this Court stated that the prosecutor's constitutional obligation under Brady is not measured by his moral culpability or willfulness in failing to disclose exculpatory evidence. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. The Court of Appeals, however, relied in part for its startling conclusion upon the government's good faith but fruitless effort to locate the Krems memorandum during the trial. Under Agurs, whether a prosecutor intentionally withholds evidence favorable to the accused or whether he simply can't find it makes no difference in the analysis.

This Court in Agurs stated that evidence favorable to the accused in the

prosecution's possession that is not disclosed to the defense is in a different category than evidence discovered "from a neutral source" after trial.

> "For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." 427 U.S. at 111.

Indeed, the Court of Appeals for the District of Columbia has held, as noted by the Court of Appeals in petitioner's case, that the due diligence standard in connection with a motion for a new trial should be no barrier to consideration of constitutional issues. Marshall v. United States, 436 F.2d 155 (D.C.Cir. 1970).

Nonetheless, the Court of Appeals below concluded that "in this Brady situation some defense diligence was required." (App. A at 13.) The scant

authorities cited by the court below for this proposition are unpersuasive. Indeed, rather than exercising a more flexible standard as suggested by Agurs, the court below has enunciated a new and higher standard a defendant must surmount before being entitled to relief from a clear Brady violation of his rights to due process under the Fifth Amendment.

Because petitioner was told that the Krems memorandum was inconsistent with Prohaska's testimony and was given Krems' address, the court below anxiously concludes that Krems was available to the defense as a witness and that the defense was obliged to speak up if it were having trouble subpoenaing Krems. Petitioner submits that this hurried conclusion by the court below is not supported by the record. The court simply fails to demonstrate how a lack of diligence, arguendo, can excuse the failure of the prosecutors to produce an item of information favorable to the accused for which specific request had been made and granted and which could have affected the outcome of the trial.

Yet this is the law in the Ninth Circuit.

Because an important constitutional question is presented in the administration of the federal criminal laws and because the opinion below conflicts with decisions of this Court, petitioner respectfully suggests that certiorari be granted as to this question.

II

The Decision Below Conflicts With this Court's Prior Decision Concerning the Willfulness Jury Instruction in a Criminal Tax Case.

Petitioner admitted at trial that he had received four of the items which the government claimed were unreported income. Petitioner, however, testified that he regarded those items as gifts from Hauser and, indeed, there is substantial evidence in the record which supports that conclusion. The government's theory was that Hauser gave these items to petitioner in anticipation of a future economic benefit, hence, they were income to

petitioner. Thus, the government's instruction given by the court charged the jury that whether the admitted payments were a gift or constituted income depended upon the private and uncommunicated intent of the transferor, Hauser. Commissioner v. Duberstein, 363 U.S. 278 (1960).

Petitioner objected to such an instruction because it could be construed by the jury as permitting the defendant to be found guilty based upon the state of mind of another and that, while such a definition of donative intent may apply in a civil tax matter, in a federal criminal trial the focus on another's state of mind denied petitioner due process. Petitioner was faced with the problem of trying to communicate to the jury that he could not be convicted if it found he reasonably believed the items he received were gifts, regardless of the private, uncommunicated intent of the transferor. The District Court refused to modify the instruction concerning the definition of income and referred to the

instruction on the element of willfulness as the solution to petitioner's problem. The instruction on willfulness which was given by the court was as follows:

> "Now, in defining those elements I use the word 'willfully.' As that term is used in the statute that is the basis of this indictment, the term 'willfully' means deliberately and with knowledge, as distinguished from careless, inadvertent or negligent. That is to say, the defendant knew and specifically intended the return to be false when he made, subscribed and filed it." (Tr. 1091.)

During the colloquy between counsel and the court in settling the jury instructions, the court read the instruction quoted above and continued to state to counsel as follows:

> "Now, a defendant who reasonably believes he has received a gift and that he did not have to include gifts, which is the law, would thus not have the requisite criminal intent even though, from the donor's point of view, it turns out not to have been a gift." (Tr. 997.)

Petitioner's counsel requested that this clarification be added to the instruction on willfulness. The trial judge refused, stating that, in his opinion, such an addition would be "too specific". (Tr. 997.)

An so, although the jury possibly could have deduced it from the general instructions given, the jury was never instructed that the defendant must be acquitted if it find he reasonably <u>believed</u> he had received a gift although his receipt in fact constituted income. Indeed, a reasonable construction of the

willfulness instruction given would prohibit a guilty verdict if the jury believed that petitioner omitted the unreported items through carelessness, inadvertence or negligence even though petitioner believed that he had received income. But the jury was not told in any clear fashion that petitioner must be acquitted if it finds that he reasonably believed he had received a gift.

This Court recently considered the element of willfulness in a criminal tax case in United States v. Pomponio, 429 U.S. 10 (1976). There the Court approved instructions on willfulness as adequate which went far beyond the limited instruction given below. In Pomponio not only was the jury implicitly instructed to acquit if it found the defendants believed the transactions were as reported on the tax return but this Court approved a further instruction given the jury that accomplished expressly what petitioner here sought at trial.

The defendants in Pomponio were charged, for example, with reporting as

loans, hence, not income, what were really taxable dividends. The defense claimed that even if those transactions were, in fact, incorrectly reported, the defendants at least believed they were correct at the time. Accordingly, this Court appears to approve the further instruction that "if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were withdrawing this money that it was not a loan . . . . In other words, you should determine whether they knew that, and as I have told you, that is an essential element." 429 U.S. at 13, n. 4.

The court below acknowledged the approval this Court has given to such an instruction and agreed that the better practice would be to give such a direct instruction when requested. (App. A at 16.) The Court of Appeals held, nonetheless, that the trial judge did not abuse its discretion in refusing the instruction in petitioner's case because a defendant has no right to particular language in jury instructions.

If petitioner requested any particular language, of course, it was only the language the trial judge himself used to describe the law. It is more appropriate to characterize petitioner's request for additional instructions not as a demand for any specific language, but rather as a reasonable request that the simple substance of the trial judge's own formulation be conveyed to the jury as it was done with approval in Pomponio.

Petitioner submits that due to the conflict between the decision below and the decision of this Court and because of the importance of the question to the administration of the federal criminal law, certiorari should be granted as to this question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 1979

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DARREL E. SHELTON,
Defendant-Appellant.

No. 77-1575

MEMORANDUM

[October 27, 1978]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY, Senior Circuit Judge; ELY, Circuit Judge; and EAST, Senior District Judge*

THE APPEAL

Darrel E. Shelton (Shelton) appeals his judgment of conviction and suspended sentence entered upon a jury verdict of guilty on one count of violating 26 U.S.C. § 7206(1) (willfully filing a false income tax return).[1] We note jurisdiction under 28 U.S.C. § 1291 and affirm.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]26 U.S.C. § 7206 provides in pertinent part:
"Any person who—
"(1) . . . Willfully makes and subscribes any return, . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .
"shall be guilty of a felony . . . ."

ISSUES ON APPEAL

Shelton urges these issues for review:

1. The evidence was insufficient to support the jury's verdict;

2. Various forms of Government misconduct deprived him of a fair trial;

3. The District Court erred in refusing to submit Shelton's requested special verdict form; and

4. The District Court improperly instructed the jury.

FACTS

Shelton was charged with under reporting his income for the year 1972. At that time, he was the Business Manager for Iron Workers Union, Shopmen's Local 509. The essence of the Government's case was that Shelton received and failed to report as income payments in property and cash from Joseph Hauser in return for getting the Union to shift its prepaid health insurance plan from Aetna to National Prepaid Health Plan (NPHP), one of several companies run by Hauser.

While the Government elected to proceed on the omission of specific items theory, rather than the net worth expenditure theory, the indictment did not spell out the amount of unreported income and the defendant was not initially made aware of the allegedly unreported items. However, the District Court denied Shelton's pretrial motion for a bill of particulars after the Government stated that the amount of unreported income charged was approximately $8,000. The District Court further ordered that the Government would be precluded from proving amounts in excess of the $8,000. Nevertheless, in its opening statement, the Government mentioned and tendered exhibits for items exceeding the $8,000 limit. On objection, the Government repeated its intention to offer evidence as to items exceeding the $8,000 limit. After colloquy, the Court reaffirmed the limit and required the Government to choose from its

pretrial memorandum which items it would attempt to prove.[2] The excessive exhibits were then withdrawn and the District Court immediately instructed the jury on which alleged items of income it would consider. During the course of the trial, Shelton admitted receiving four of the six items but contended they were not reportable as income because they were gifts from his longtime friend Hauser. He denied receiving the $5,000 cash payment or the clothing.

The Government's key witness, Ronald Prohaska, the Union's former Business Agent working under and with Shelton, testified that the Union's health insurance plan was up for renegotiation in 1972 and in late 1971 Shelton told him that Hauser would pay them a large amount if they could swing the Union's health insurance business to Hauser's company. He further testified that he and Shelton successfully accomplished the shift to NPHP in May or June of 1972. Prohaska also testified that he, Shelton and Hauser were present at a Mr. Big's clothing store when Hauser paid for several hundred dollars worth of clothing for the two of them. He also stated that he and Shelton each received a $5,000 cash payment from Hauser in June, 1972.[3]

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[2]The Government finally settled on the following items:

Item	Date of Transfer	Amount
1. Refrigerator	1/20/72	$ 872.55
2. Hotel bill	2/ 9/72	134.26
3. Clothing	2/10/72	422.00
4. Cash	1972	5,000.00
5. Television set	3/ 6/72	314.95
6. Hotel bill	11/14/72	476.43
TOTAL		$7,220.19

[3]No other witness testified that Shelton was present at Mr. Big's or that he had received the clothes. Shelton and Hauser denied their presence and that Shelton received any of the clothes. George Herrera, a Hauser employee, testified that he, not Hauser, was present to authorize the purchase, that Shelton was not present, and that Prohaska was the only recipient of clothing. However, while the sales receipt did not bear Shelton's name, it did indicate the sizes of the garments. From other testimony, the jury could have concluded that some of the clothing would have fit Shelton.

Prohaska did not actually see Hauser give Shelton the $5,000. He testified that Hauser gave him his share and stated that he would pay Shelton in Las Vegas the following day. Prohaska testified that he, Shelton, Hauser, Priscilla Rowe, and others were in Las Vegas that June and that Hauser lost Shelton's $5,000 while gambling. Priscilla Rowe testified that she heard Shelton comment that Hauser was losing "his five." Finally, Prohaska testified that after their return from Las Vegas, Shelton said he had finally received the $5,000 from Hauser.

[4]Property acquired by gift within the meaning of the Internal Revenue Code is, of course, not gross income and need not be reported. *E.g.*, *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

Prohaska also testified that in May, 1973, after the Government began its investigation of their activities, he, Shelton, Hauser and Sidney Krems attended a meeting in which they discussed which of Hauser's payments to them could "haunt" them.

Defense counsel vigorously cross-examined Prohaska. First, Prohaska admitted that he had been given immunity for the very same acts for which Shelton was being tried; second, he admitted receiving more than $3,000 in witness or informant's fees from the Government—approximately $2,400 of this amount was related to his testimony in the instant case; and third, Prohaska admitted that he had perjured himself before the grand jury on at least two occasions with respect to the overall investigation which encompassed Shelton's case. Prohaska's testimony that he bore no animosity toward and made no threats against Shelton because Shelton fired him from his union job was directly contradicted by the testimony of two defense impeachment witnesses.

Finally, the core of Prohaska's testimony was directly contradicted by Shelton, Hauser, and Herrera.

DISCUSSION

Issue 1, Sufficiency of the Evidence.

The only disputed elements in this case were whether Shelton's return was materially false (*i.e.*, whether he had even received the unreported items or, if so, whether they were gifts and hence not reportable)[4] and whether he acted willfully in failing to report them (*i.e.*, whether he reasonably believed the items were gifts).

Shelton claims that the evidence was insufficient because "Prohaska was so thoroughly impeached that as a matter of law his testimony should not be considered or in the alternative, that even with his testimony the evidence is still insufficient . . . ."

"On appeal from a criminal conviction, this court must construe the evidence direct and circumstantial in a manner consistent with the jury's verdict, resolving all conflicts in the evidence in favor of the prosecution. . . . We cannot weigh conflicting evidence, nor consider the credibility of witnesses." *United States v. Rodriguez*, 546 F.2d 302, 306 (9th Cir. 1976). Citations omitted. In *United States v. Rojas*, 554 F.2d 938 (9th Cir. 1977), this Court reversed a decision in which the District Court, accepting an argument identical to that made here, granted the defendant's motion for a judgment of acquittal following the return of a guilty verdict by the jury. In reversing, this Court reiterated that " 'it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts.' " *Id.* at 943, quoting *United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969).

The uncorroborated testimony of an accomplice, although suspect, can support a conviction. *United States v. Hibler*, 463 F.2d 455, 458 (9th Cir. 1972). This is "the rule even though the accomplice is in a position to gain favors from the government by his testimony . . . and even though there are inconsistencies in his story . . . so long as it is not 'incredible or unsubstantial on its face.' " *Lyda v. United States*, 321 F.2d 788, 794-95 (9th Cir. 1963). (Citations omitted) Before an appellate court may disregard a witness' testimony, it must be "inherently implausible." *Rojas*, 554 F.2d at 943. *Accord, United States v. Cravero*, 530 F.2d 666 (5th Cir. 1976). We cannot say that Prohaska's testimony was inherently implausible.

Accordingly, we believe the evidence, viewed in the light most favorable to the Government, is sufficient to support the jury's verdict.

Issue 2, Alleged Government Misconduct.

Shelton's next argument is that the combined effect of various forms of Government misconduct deprived him of a fair trial. The conduct complained of by Shelton covers three categories: First, he argues that the Government illegally paid Prohaska informant fees under the guise of a federal statute providing only for the payment of witness fees under conditions not here met. Second, Shelton claims he was prejudiced when the Government violated

the District Court's order limiting proof when it submitted and the jury viewed exhibits detailing allegedly unreported items exceeding the District Court's $8,000 limitation. And third, Shelton contends that he was prejudiced by the Government's delay with respect to some evidence and failure with respect to other evidence to turn over exculpatory evidence as required under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and to a lesser extent the Jencks Act, 18 U.S.C. § 3500. These complaints are considered seriatim.

During the preparation of this case for trial, the Government paid Prohaska substantial sums of money ostensibly as witness fees pursuant to 28 U.S.C. § 1821. This statute provides for the payment of $20 per day plus travel expenses to "[a] witness attending in any court of the United States, or before a United States Commissioner [magistrate], or before any person authorized to take his deposition . . . ." Shelton argues that under the facts here, these payments were made in violation of § 1821 and constituted disguised informant fees which misled the jury about Prohaska's credibility. On this basis, Shelton invites us to use this Court's supervisory power to strike Prohaska's testimony.

Assuming, *arguendo*, that the payments violated the witness fee statute, it would not justify the remedy sought. The use of the Court's supervisory power is properly limited to those situations in which the Government's misconduct, though falling short of a constitutional violation, threatens " 'the integrity of the judicial process' . . . ." *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.), *cert. denied*, 46 U.S.L.W. 3215 (U.S. Oct. 4, 1977) (No. 76-1630). (Citation omitted). *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., concurring specially).

The issue of payments to Prohaska was fully aired to the jury.[5] Moreover, the District Court cautioned the jury about carefully weighing the credibility of "an informer who provides evidence against a defendant for pay . . . ."

[5]During the cross-examination of Prohaska, it was brought out at length that he had received more than $2,400 from the Government in exchange for his cooperation in the Shelton case. During the cross-examination of another Government witness, it became apparent that even more money had been paid to Prohaska in connection with another investigation. The District Court allowed Shelton to recall Prohaska for further cross-examination and the

"Informant fees are neither unlawful nor unduly prejudicial per se. And there is no contention here that the payments were based on the type of contingent fee arrangement condemned by the Fifth Circuit in *Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962). See Annot., 13 ALR Fed. 905 (1972). In essence, Shelton's argument boils down to the claim that Prohaska's testimony should be stricken because the Government paid for it out of an improper source of funds. While we could neither endorse nor condone such action, we feel that to resort to the exercise of the Court's supervisory power on these facts would be an improper use of the power merely to foreclose law enforcement practices which we do not approve. *See Hampton v. United States*, 425 U.S. 484, 490 (1976).

Shelton complains that he was prejudiced because at the outset of the trial the Government submitted and the jury viewed exhibits related to items of allegedly unreported income in excess of the aggregate $8,000 limitation previously imposed by the District Court. Although there is no excuse for the Government's disregard of the order limiting proof, this claim is unavailing.

Given the assumption that juries ordinarily follow a court's instructions, *United States v Fassler*, 434 F.2d 161, 163 (9th Cir. 1970), *cert. denied*, 401 U.S. 1011 (1971), error in the admission of evidence can generally be "cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it." *Maestas v. United States*, 341 F.2d 493, 496 (10th Cir. 1965). *United States v. Jiminez-Badilla*, 434 F.2d 170, 174 (9th Cir. 1970). This course was taken by the District Court here preventing any prejudice to Shelton.[6]

nature of the additional payments—about $550—was also fully explored. It should be noted that while the Government did not initially inform defense counsel of the additional payments, the District Court was fully satisfied with the Government's explanation and found the failure to be inadvertent. In any event, before it retired the jury was fully informed as to the total amount afforded Prohaska in exchange for his cooperation.

[6]We note that the offending exhibits were only briefly before the jury at the outset of the trial and there was no development of the withdrawn evidence by Government. Although there were two subsequent references to one of the stricken exhibits, they were of little import when viewed in the context of the entire trial. In any event, defense counsel did not object to those references.

Shelton next complains that his conviction should be reversed because the Government violated *Brady v. Maryland* in that it delayed turning over 500 pages of alleged *Brady* material until the eve of the trial and in that it failed to turn over another 1,900 pages of alleged *Brady* material until after trial.[7] In *Brady*, the Supreme Court held that it is a denial of due process for the prosecutor to fail to disclose evidence in his possession which is material to the defense. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court explained that the standard of materiality varies in these situations "depending on the nature of the information withheld and the type of request made by the defendant for the production of the material." *Skinner v. Cardwell*, 564 F.2d 1381, 1384 (9th Cir. 1977). *See also United States v. Brown*, 562 F.2d 1144, 1150 (9th Cir. 1977).

Shelton claims that much of the 500 pages of information turned over to the defense the day before trial impeached Prohaska's credibility. Assuming that all of this information was material within the meaning of *Brady*, the delay in disclosing it only requires reversal if "the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976). There can be no claim of prejudice insofar as the defendant was enabled to present to the jury favorable or impeaching evidence. *United States v. Bracy*, ___ F.2d ___, Nos. 76-3416, 76-3289, 76-3325 (9th Cir. Dec. 23, 1977). *Accord, United States v. Kaplan*, 554 F.2d 577, 580 (3d Cir. 1977); *United States v. Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976), *cert. denied*, 431 U.S. 906 (1977).

Unlike in *Miller*, the evidence here was received on the day before trial, not near the end of the defense case. And, although unlike in *Miller*, no continuance was offered, there was a five day delay after the second day of trial. Finally, much of the evidence turned over consisted of the grand jury testimony of Hauser and Herrera, both of whom testified for the defense. Thus, Shelton has

[7]The charges here were an offshoot of a widespread, if not national, federal investigation of alleged corruption and crime, thus explaining the huge mass of so-called *Brady* material called for by the defense in this rather simple case.

failed to demonstrate how the Government's delay in disclosing the 500 pages of information prejudiced the preparation of his case.[8]

The contention with respect to the Government's failure to disclose alleged *Brady* material until after trial is divided. The first attack relates to about 1,900 pages of information turned over to the defense during preparation for prosecution of a companion case in which Hauser and Shelton comprised two of the three defendants. This material was disclosed in time for the District Court to consider it in passing on Shelton's motion for a new trial in this case. The second attack focuses on a statement given to the Internal Revenue Service on March 7, 1974 by Sidney Krems, Hauser's accountant, which statement was disclosed during the briefing of this appeal.[9]

With respect to the 1,900 pages of information, the *Brady* request can only be classified as general.[10] "The standard of materiality in such cases is whether the 'omitted evidence creates a reasonable doubt that did not otherwise exist.'" *United States v. Brown*, 562 F.2d at 1150, quoting *United States v. Agurs*, 427 U.S. at 112. The District Court rejected Shelton's motion for a new trial after reviewing the omitted evidence, finding that it was cumulative or, to the extent it was not, it was remote and collateral in the extreme. We agree. Impeachment evidence, even that which tends to further undermine the credibility of the key Government witness whose credibility has already been shaken due to extensive cross-examination, does not create a reasonable doubt that did not otherwise

[8]The contention with respect to material turned over before the end of the trial includes some Jencks Act material consisting of the transcript of Prohaska's testimony from one of his four grand jury appearances. However, as this evidence was disclosed during his cross-examination, there was no violation of the Jencks Act.

[9]The Government's motion to include the text of this statement in the record before this Court was granted on November 30, 1977 and the statement may, therefore, be properly considered in disposing of this appeal.

[10]Although there was much discussion between counsel and the District Court over the nature of *Brady* material, the Government had little guidance other than that it was to disclose everything which tended to impeach Prohaska's credibility. Such a request is general since it "did not give 'the prosecutor notice of exactly what the defense desired.'" *United States v. Lasky*, 548 F.2d 835, 839 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (U.S. Oct. 14, 1977) (No. 76-1542).

exist where that evidence is cumulative or collateral. *United States v. Brown*, 562 F.2d at 1150-51. *See also United States v. Mackey*, 571 F.2d 376, 389 (7th Cir. 1978).[11]

Shelton also claims that the Government's failure to disclose a statement made by Sidney Krems necessitates a new trial under the teachings of *Brady*. As was mentioned earlier, Prohaska testified on direct examination that Krems was among those who attended a meeting in 1973, the purpose of which was to cover-up Hauser's payments to Shelton and Prohaska. Shelton and Hauser denied the meeting took place but Krems did not testify.

During its cross-examination of Prohaska, the defense made a *Brady* request for "[i]nterview reports of a bookkeeper named Sidney Krems." Counsel for the Government stated that he believed Krems had been interviewed by the Internal Revenue Service and the District Court ordered disclosure of the report. However, the Government was unable to locate the report until well after the trial. The memorandum of the Krems interview, which was made a part of the record for this appeal, states that Krems was reminded of allegations that he was involved "in attempts to cover up illegal payments to other individuals," that he was the subject of a related IRS investigation and that the Special Agent wished to ask him questions "[i]n connection with my investigation of the tax liability of JOSEPH HAUSER and others . . . ." Insofar as it is relevant to Shelton's *Brady* request, the memorandum indicates: "KREMS insisted that he was innocent of any wrongdoing. He stated 'I know of no payoffs that JOE made to anyone,' and 'I am not aware of any payoffs or cover-ups.'"

We are satisfied that Shelton's request for Krems' statement was "specific"—that is, by "focus[ing] his request on a particular witness," the defense gave "'the prosecutor notice of exactly what the defense desired.'" *United States v. Mackey*, 571 F.2d at 389.[12]

[11]Shelton complains that the Government's failure to turn over material was deliberate. First, we note that the District Court expressly rejected this argument with respect to the 1,900 plus pages of evidence. Second, it is now clear that the prosecution's motive in failing to turn over alleged *Brady* evidence is irrelevant in determining its materiality. *Agurs*, 427 U.S. at 110; *Skinner v. Cardwell*, 564 F.2d 1381, 1385 (9th Cir. 1977); *Brown*, 562 F.2d at 1149.

[12]It is true that in *Agurs*, the Supreme Court said that a specific request "is characterized by a *pretrial* request for specific evidence." 427 U.S. at 104.

In such situations, if "a substantial basis for claiming materiality exists . . . the failure [of the prosecutor] to make any response is seldom, if ever, excusable." *Agurs,* 427 U.S. at 106.

Clearly, a substantial basis exists for claiming that the Krems' statement was material in a *Brady* sense. The Government relied heavily on Prohaska's testimony about a cover-up meeting to prove that Shelton consciously attempted to conceal payments that he knew were income. Krems' statement can be construed as contradicting that testimony. It is true, however, that Krems' denials were cumulative given the similar denials by Shelton and Hauser. Thus, in view of the substantial impeachment of Prohaska from other evidence, the addition of Krems' testimony would not have created a reasonable doubt that did not otherwise exist. However, Krems was a much more marginal figure than either Shelton or Hauser, and his testimony may have been given greater credibility by the jury. Accordingly, nondisclosure in the face of a specific request would be inconsistent with *Brady's* "concern that the suppressed evidence might have affected the outcome of the trial." *Agurs,* 427 U.S. at 104.

Nevertheless, we feel that a rejection of Shelton's *Brady* claim is still required here. In reaching this conclusion, we keep in mind that the primary concern expressed in the *Brady* line of cases is that the accused not be deprived of a fair trial. *Agurs; United States v. Bracy,* slip at 3353.

This is not a case where, when faced with a specific *Brady* request, the Government failed to make any response.

The Government initially resisted Shelton's request for Krems' statement on the ground that "Mr. Krems is equally available to the defendant. He is not unknown in any sense." Although this

(Emphasis added). Here, Shelton's requests for *Brady* material did not specifically focus on Krems until during the trial. However, Krems' statement was singled out before the prosecution completed its case in chief, and the Government does not argue that it could have uncovered the Krems' statement before the conclusion of the trial had it only been singled out before trial. Finally, Shelton could not reasonably have been expected to single out Krems in his pretrial requests since the defense first became aware that Prohaska claimed the occurrence of a cover-up meeting involving Krems during his (Prohaska's) direct examination. On these facts, we feel Shelton's request is properly characterized as specific even though it was not made before the trial.

was not disputed by Shelton's defense counsel, the District Court reasonably ordered production of the statement.[13] During ensuing colloquy, the Government's counsel indicated that he thought he had only Krems' grand jury testimony and that it would be supplied. The District Court indicated Krems' last known address should also be made available, and Shelton's counsel stated that would be satisfactory.

Notwithstanding this colloquy, the parties understood that the Government's efforts to locate the Krems' statement were to continue. After Prohaska's testimony but before the close of the Government's case, the subject was raised in open court again. Counsel for the Government stated that the transcript of one Krems interview had been located and disclosed and that another apparently existed which he did not then have. Upon questioning by the District Court, the Government further stated that Krems' address had been supplied to the defense. Thus, the question of Krems' availability to the defense was again raised. Defense counsel made no protestation that he did not know Krems' address or that he had been unable to locate him. In fact, he stated that he had not even attempted to subpoena Krems. Two days later the Government reported in open court that the search for the Krems' statement had been fruitless so far and that the search was continuing. Although defense counsel was present, he still gave no indication that he had had difficulty locating Krems on his own or that he had tried to do so. The Krems IRS statement was eventually turned up after the conclusion of the subsequent Shelton and Hauser trials during a search of other files. It was immediately made available to the defense and this Court. The circumstances of its discovery were detailed in an affidavit submitted with the Government's motion to augment the record on this appeal with Krems' statement. We have reviewed the affidavit and are still satisfied that the Government made a good faith effort to locate the statement earlier.

It has also been held that the due diligence standard on the part of a defendant in connection with a motion for a new trial should be dispensed with when the new evidence raises constitutional issues. *Marshall v. United States,* 436 F.2d 155 (D.C. Cir.

[13]After all, the Government could hardly be hurt by disclosing that which the defense could easily obtain. Further, the Government made no argument that the effort necessary to make disclosure was unduly burdensome in view of the defendant's independent access to the information.

1970). This position draws some support in the *Brady* context from the Supreme Court's decision in *Agurs*. There the Court held that even where the accused made no request for *Brady* material, he would not be required to meet a test as stringent as that normally applied in determining motions for new trials. 427 U.S. 110-11. We feel that in this *Brady* situation some defense diligence was required.[14] Basically, we find ourselves in agreement with the following comment in Seventh Circuit's comments in *United States v. Hedgeman*, 564 F.2d 763, 768 (7th Cir. 1977):

> "While we do not necessarily disagree with the D.C. Circuit's statement [in Marshall] as a general principle, we do not think in application that it should be carried to the extreme that we find ourselves as arbiters in a case exemplifying *Brady's* 'sporting theory of justice.' We are of the opinion that at the very least the evidence must be newly discovered, and in this respect it appears to us that failure to exercise diligence can be so obviously bordering on gamemanship as to place the evidence constructively in the category of non-newly discovered."

Reversal on the facts of this case would amount to permitting the gamemanship just condemned. First, Shelton knew exactly what benefit he hoped to secure from Krems' testimony and, therefore, had an incentive to seek him out. Second, the record supports the conclusion that Krems was available to the defense. It is not disputed that Krems was Hauser's accountant or bookkeeper and Hauser knew where to contact him. Hauser cooperated fully with and testified at length for the defense—this included his denial of the cover-up meeting. The colloquy in open court between counsel over the whereabouts of the Krems' statement has already been detailed above. Suffice it to say, that given the nature of that colloquy, there was an obligation on the part of the defense to speak up if difficulty was being encountered in locating Krems. Nothing was forthcoming. Under these circumstances, it is unreasonable to ask us to believe that the defense could not have contacted Krems.

[14]This Circuit has indicated in other contexts that some diligence is still required in *Brady* situations. In *Wallace v. Hocker*, 441 F.2d 219 (9th Cir. 1971), it was held that the prosecution was not required to produce exculpatory evidence about which the defendant knew in the absence of a request. And in *United States v. Brown*, we stated that a general *Brady* request was not sufficient to require disclosure when the defense "negligently failed to discover and utilize information in their own possession." 562 F.2d at 1151.

We hold that the combination of the nature of the Government's response to Shelton's specific *Brady* request for the Krems' statement and the lack of diligence on the part of the defense in attempting to obtain Krems' evidence independently establish that this nondisclosure did not deprive Shelton of a fair trial.

Issue 3, Special Verdict.

The District Court rejected Shelton's request that a special verdict be submitted to the jury calling upon them to decide which of the six items, if any, constituted income to Shelton. He argues the special verdict was required on the ground that without it he was prevented from arguing following a guilty verdict, either to the District Court or this Court, that he was convicted solely with respect to an item which was insubstantial as a matter of law.[15] We disagree.

It has long been established that special verdicts in criminal jury trials are disfavored, *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976); 2 Wright & Miller, Federal Practice & Procedure, § 512 (1969). And while this Court has held that the District Court may submit a special verdict in appropriate cases, *O'Looney*, 544 F.2d at 391-92, Shelton has cited no case and we have found none in which it was held that the refusal to grant a special verdict was error. In fact, this Court has previously upheld the refusal to grant a defendant's request for a

[15]Shelton also argues that the special verdict would have cured the prejudice due to allowing the jury to view the improper exhibits. However, we have already held that there was no such prejudice in view of the District Court's prompt action in withdrawing the exhibits and carefully instructing the jury to disregard them.

The Government is not required to prove a tax deficiency to sustain a charge of violating § 7206(1). *United States v. Miller*, 545 F.2d 1204,1211 n.8 (9th Cir. 1976), *Schepps v. United States*, 395 F.2d 749 (5th Cir.), *cert. denied*, 393 U.S. 925 (1968). *See United States v. Fritz*, 481 F.2d 644, 645 (9th Cir. 1973). The willful omission of gross income is sufficient. *E.g., United States v. Mirelez*, 496 F.2d 915, 917 (5th Cir.), *cert. denied*, 419 U.S. 1069 (1974). However, the Government correctly concedes that the omission must be substantial. *See United States v. Jernigan*, 411 F.2d 471, 473 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969); *Sirayo v. United States*, 377 F.2d 469 (1st Cir. 1967).

special verdict in another single count multi-item case. *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). *Cf. United States v. Munz*, 542 F.2d 1382 (10th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Jackson*, 542 F.2d 403 (7th Cir. 1976).

Finally, it is not at all clear that the absence of the special verdict prevented Shelton from making any substantiality argument. The District Court instructed the jury that, with the exception of the smaller hotel bill, any of the six items, standing alone, could be the basis of a conviction if they found it to be substantial.

Issue 4, Jury Instructions.

Shelton makes two claims with respect to the jury instructions. First, he argues that the Court incorrectly set out the definition of gift. Second, Shelton contends that the instruction on willfulness was erroneous in that it was incomplete. Neither contention has merit.

The trial court instructed the jury that gross income does not include the value of property acquired by gift and that whether an item is a gift depends on the *transferor's* intent. This was a correct statement of the law. *Commissioner v. Duberstein*, 363 U.S. 278 (1960). Shelton's argument that this allows a person to be convicted of a criminal offense based upon another's state of mind is unpersuasive since the element of willfulness prevents a conviction based solely on the state of mind of one other than the defendant.

The District Court instructed that "the term 'wilfully' means deliberately and with knowledge, as distinguished from careless, inadvertent or negligent. That is to say, the defendant knew and specifically intended the return to be false when he made, subscribed and filed it." During the conference on jury instructions, the District Court recognized that if Shelton reasonably believed that the items received were gifts, he would not have acted willfully in failing to report them on his return. However, the District Court rejected defense counsel's request to add such a statement to the willfulness instruction on the ground that it was "too specific." Rather, it was left to the defense "to make that argument within the instruction of 'wilfulness' which I am going to give."

It is true that the Supreme Court approved the essence of what was sought here in *United States v. Pomponio*, 429 U.S. 10, 13 n.4 (1976). However, while the better practice may be to give such instructions when requested, we hold it was not an abuse of discretion to refuse it here. The defendant has no right to any particular language in the instructions. It is sufficient if the instructions taken as a whole encompass the instruction sought. *United States v. Kaplan*, 554 F.2d 958, 968 (9th Cir. 1977). "Instructions are not a substitute for argument to the jury. If the judge fairly instructs the jury as to applicable principles of law so as to allow counsel on each side sufficient latitude to argue what he considers to be key points in his case, the trial judge has performed his duty." *United States v. Campanale*, 518 F.2d 352, 362 (9th Cir. 1975). This much was done here. We conclude that the instructions as a whole were fair.

The District Court's judgment of conviction and suspended sentence entered on February 11, 1977 is affirmed.
AFFIRMED.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The record quite clearly reveals that repeated requests for possibly exculpatory evidence were essentially and inexcusably disregarded by the Government prosecutors to whom the requests were properly directed. Not until the eve of trial did the prosecution suddenly produce more than 500 pages of material that, as I see it, should have been delivered to the defense long before. Moreover, the prosecution followed the same unsavory pattern during the trial and thereafter, not delivering additional material until there had been continued requests by the defense and, also, prodding by the trial judge. In these circumstances, and in the light of *Brady v. Maryland*, 373 U.S. 83 (1963), the judgment of conviction should be reversed.

The Government's case rested heavily upon the testimony of one Prohaska, a former employee of the Union. Without his testimony, the evidence would have been insufficient to support Shelton's conviction. The voluminous material withheld by the Government, especially the records containing the denials by Shelton's accountant of a coverup meeting, impeached Prohaska and Prohaska's incriminating testimony. My Brothers hold that because these

materials were merely cumulative, consisting largely of testimony duplicated by two witnesses for the defense, Shelton was not harmed by the late disclosure. I simply cannot agree.

It is true, of course, that our Circuit's rule, a rule that I dislike (*See, United States v. Andrews*, 455 F.2d 632, 633, n.1 (9th Cir. 1972)), is that the uncorroborated testimony of an accomplice, standing alone, will support a conviction. *United States v. Sigal*, 572 F.2d 1320, 1324 (9th Cir. 1978); *Moody v. United States*, 376 F.2d 525, 528 (9th Cir. 1967). Nevertheless, an enhanced impeachment by the accused, armed with material amassed by the Government during its investigation, could have well been pivotal as the jury weighed the evidence relating to Shelton's guilt or innocence. Thus, I submit that it cannot be said that the *Brady* error was harmless beyond a reasonable doubt. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

I take no pleasure in reprimanding government prosecutors or any other attorneys, and I emphasize that, most assuredly, there is no indication here that exculpatory material was intentionally suppressed. What is all too apparent, however, is a demonstrated laxity and failure seriously to undertake the prosecutorial duty to examine government files for requested material that may show that a case against an accused is unfounded. In our land, the attainment of a conviction must never become the sole goal of the prosecution. "(T)he interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done . . . ."[1] I thoroughly share the opinion of Judge Hufstedler, written in a cogent dissent about two years ago:

> "We should not be hesitant in rigorously applying *Brady* and enforcing that rule even though reversals of criminal convictions may thereby result. The *Brady* rule does not result in the suppression of relevant evidence, but in its disclosure, thereby shoring up the integrity of the fact-finding process."

[1] *Introduction* to ABA Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, at 3 (Approved Draft 1972), *cited in United States v. Butler*, 567 F.2d 885, 893 (9th Cir. 1978) (Ely, J., concurring).

United States v. Miller, 529 F.2d 1125, 1130 (9th Cir. 1976).

I would vacate the convicting judgment and permit Shelton, rightly prepared, to defend himself again.

11-6-78—400 BOWNE-PERNAU WALSH, SAN FRANCISCO, CA

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DARREL E. SHELTON, Defendant-Appellant.	No. 77-1575 ORDER

Appeal from the United States
District Court For the
Central District of California

Before: DUNIWAY, Senior Circuit Judge;
ELY, Circuit Judge, and EAST,
Senior District Judge*

The defendant-appellant's petition for rehearing is denied.

Judge Ely would grant the petition.

Filed: January 17, 1979

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.